U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue date: 07Oct2002

CASE NO.: 2002-LHC-00659

In the Matter of

LORRAINE MORGANTI
Claimant

v.

LOCKHEED MARTIN CORPORATION
Employer

and

ACE AMERICAN INSURANCE CO.
Carrier

Appearances:

Victoria E. Mannes, Esquire
Daniel O. Rose, Esquire, Co-counsel
Kreindler & Kreindler
For Claimant

Keith L. Flicker, Esquire
Flicker, Garelick & Associates
For Employer

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Lorraine Morganti, Claimant, Widow of Rocco Morganti, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

A formal hearing was held in New York, New York on May 3, 2002, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. At the formal hearing, Mr. Jack Ross, Dr. Richard Schuler, Mr. Enrique Sanchez, Mr. Lee Agard and Mr. Marc Lehman testified. Deposition testimony of Mr. Joseph Donovan, Mr. Thomas O'Brien and Mr. Stanley Pamel was later submitted.

Received into evidence were Claimant's Exhibits, "C-1 through C-6 (including C-6A through C-6GG), and the Employer/Carrier Exhibits A through K. Claimant's exhibits will be marked "CX" followed by the Exhibit number and the Employer/Carrier's exhibits will be marked "EX" followed by the Exhibit number.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. Mr. Rocco Morganti, while in the course and scope of his employment for Lockheed Martin, died on December 20, 2000 on Cayuga Lake in Lansing, New York. The cause of death was drowning.

2. Lockheed Martin was timely notified of the incident.

3. Claimant, Lorraine Morganti, filed a Claim for Death Benefits on July 8, 2001. The Employer/Carrier timely filed a Notice of Controversion on July 19, 2001.

4. Claimant was legally married to Mr. Rocco Morganti, the decedent, at the time of his death and is a statutory widow pursuant to Section 9 of the Longshore and Harbor Workers' Compensation Act. There are no other statutory dependents under Section 9.

5. The Carrier has paid Claimant continuing death benefits under the New York Worker's Compensation Law, the "NYWCL" at the weekly rate of $400.00 since the date of death. The Carrier also paid Ms. Morganti, the Claimant the sum of 5,000.00 in funeral expenses under the "NYWCL."

ISSUE

The sole issue to be determined by this court is whether the Claimant can demonstrate by the evidence of record that her decedent husband met the situs and status requirements allowing him to be considered a Longshoreman and, therefore, a covered employee under the provisions of Section 2(3) of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

STATEMENT OF THE CASE

Rocco Morganti was an engineer employed by Lockheed Martin-Syracuse, New York. Part of his job involved testing sonar transducers at his work station on the R/V Paganelli. The Paganelli is a stationery work platform anchored in Cayuga Lake, which is located in upstate New York. CX 1. Id. The Paganelli is reachable only by a shuttle boat named the "Little Toot II." This vessel runs from a dock, Portland Point, to the Paganelli, which is located approximately a quarter mile from the dock.

The transducers are manufactured at the Lockheed Martin-Syracuse, New York facility and then trucked to Portland Point. They are then placed aboard the Little Toot shuttle vessel by Mr. Lee Agard, a Lockheed Martin employee based at Portland Point. Agard had the exclusive responsibility of loading the transducers on to the shuttle boat, as well as transporting the transducers from the shore to the Paganelli and placing them into the water for testing, he was sometimes assisted by Morganti in loading and unloading the transducers.

On December 20, 2000, Agard loaded the transducers to be tested from Portland Point on to the shuttle vessel and on to the Paganelli. Additionally, Agard loaded the tested transducers from the Paganelli to the shuttle vessel and on to the dock at Portland Point for their return to Lockheed Martin-Syracuse by truck. After a full day of testing, Morganti died as a result of drowning in Cayuga Lake.

Pursuant to their contract with the U.S. Navy, ten percent (10%) of the transducers Lockheed manufactured were tested in Lake Cayuga. TX 139; 257-258[1]. The Cayuga Lake facility included the Portland Point dock, the Little Toot, and the Paganelli. The facility was owned, maintained, and operated by Lockheed Martin. TX 139-149.

[1]The following references will be used herein when designating the source of testimony: "TX" indicates the transcript pages from the hearing held before me on May 3, 2002; "TR" indicates the deposition pages of the respective deponent.

SUMMARY OF THE EVIDENCE

Testimony of Enrique D. Sanchez, Jr.

Sanchez testified at the hearing in this matter on May 3, 2002 in New York, New York. He stated that he is currently manager of engineering, labs, materials, test design and components [at Lockheed - Syracuse]. TX 138. Further, he stated that part of his job responsibility is to supervise that portion of the Lockheed business which involves the testing of sonar transducers. He stated that he started the job in June, 2001 but that the job remains the same today as it did on December 20, 2000. TX 139. Sanchez testified that the transducers are tested on Lake Cayuga to see if they comply with United States Navy specifications. TX 139. He stated that the contract turns an unknown profit for Lockheed in the process.

Sanchez testified that a transducer is tested by loading it into the water from the platform, injecting a signal, taking measurements, gathering data, and removing the transducer from the water. TX 140. He went on to state that approximately ten percent of the transducers manufactured at the Syracuse facility are tested at Cayuga Lake. TX 140. He stated that Lockheed chose Lake Cayuga because the acoustic conditions lend themselves to performing these tests. TX 141.

The process by which the transducers are tested on Lake Cayuga was described by Sanchez as follows: first, they are placed in a shipping container, then transported to the lake by Lockheed employees in a company truck. Once at Portland Point, they are off loaded either onto the ground or directly onto another vessel called Little Toot II for transport to the Paganelli. TX 142. The only person in charge of transporting the transducers from the Portland Point facility to the Paganelli barge was Mr. Agard. TX 142. Sanchez stated that he has never seen this operation but has been on the Paganelli to witness testing conditions and insure that such testing meets the Navy contract specifications. TX 143. These conditions are: (a) that the equipment on the Paganelli is in proper working order to effectively monitor the performance of the transducer, and (b) to make certain that the conditions in which this is conducted replicate the maritime conditions in which this sonar is likely to be used. TX 143-144. Sanchez also stated that one of the criteria for testing is the size of the lake. Other factors include the availability of space 1200 feet from shore for testing, as well as the quietness of the lake and its depth. TX 147. In order to get out to the Paganelli, Sanchez stated that he used the Little Toot, a Lockheed owned, maintained and operated water craft. TX 148.

Sanchez testified that an employee, Larry Martinelli, is present either on the shore or at the Paganelli during day to day operations and basically oversees the activity, transporting and testing. TX 149. However, he also stated that there was not someone who held Mr. Martinelli's job on December 20, 2000. TX 154. He further

stated that Mr. Agard operated the Little Toot for as long as he can remember. TX 154. As of December 20, 2000 and including today, Sanchez stated that he is not aware of any discussions which would lead to a conclusion that using Lake Cayuga for transducer testing was not the best place to conduct those tests. TX 155.

According to Sanchez, there is nothing else on the Paganelli other than transducers. TX 156. He stated that Mr. Agard alone was in charge of moving the transducers from the shore to the Little Toot and the Little Toot onto the Paganelli. TX 156. Further, he stated that there is no prohibition which would prevent people who are on the barge from helping Mr. Agard from time to time. TX 156. Upon completion of the testing, he stated that a report is generated, which would indicate the weather and water conditions. TX 159. This is necessary so as to avoid temperature shock to the transducer. TX 160.

Upon cross-examination, Sanchez stated that the full name of his employer is Lockheed Martin Naval Electronics and Surveillance Systems, Syracuse, New York. TX 162. He stated that it is a division of the Lockheed Martin Corporation and that Mr. Morganti worked for this division. TX 162. Further, he stated that this division is basically a systems integrator that produces transducers and radar systems. TX 162. Systems integration means that Lockheed may sub-contract out certain parts development but then build and test the complete system at its facilities. TX 163. These systems include combat systems, surface ships, submarine combat systems and radar systems. TX 163. Typically, Sanchez stated, this will be sonar systems, radar systems, sonar systems, and radar systems. Additionally, Lockheed also makes radar systems above ground. TX 164. The transducer is a part of the overall sonar, tied to the front end of the system. TX 164. He stated that these transducers are not sold to anyone other than the military. TX 164.

Lockheed-Syracuse currently only makes one type of transducer and it is the one they are currently testing. TX 165. However, he stated that all of the transducers made by Lockheed-Syracuse are subject to Navy specifications or requirements. TX 165. As such, the Navy requires that ten percent of the transducers be tested. TX 165. Sanchez stated that he does not have technical knowledge of what exactly is being tested on Lake Cayuga but that the senior test engineer, Mr. Lehman, can testify to such knowledge. TX 166. He stated that Mr. Morganti performed as a test engineer, but Sanchez was unaware of his title.

Sanchez testified that the Paganelli's platform is about 110 feet [long], 34 feet wide. TX 174. The Paganelli floats and was constructed on the shore at Portland Point. TX 175. Sanchez stated that Portland Point is approximately 1200 feet from where the Paganelli barge is moored. TX 175. He stated that the barge is secured at two angle points on either end by anchors weighing approximately 60,000 pounds and a sinker which weighs approximately 8200 pounds each attached to fairly large chains

that are about 540 feet each apiece from anchor to buoy. TX 175. Sanchez termed it as a permanent mooring and that the barge has been moored in that location since 1982. TX 176. Since then, the barge has never been moved. TX 176. The mooring system which holds the Paganelli down is approximately 40 years old. TX 176. It was used for a previous platform called the Coolidge. TX 176. The Coolidge was a previous platform that was on the lake from 1960 until 1982 when this barge came on. TX 177. Therefore, Sanchez stated that the mooring system has been in place since about 1960. Further, the 60,000 pound securing post which was originally sunk 350 feet to the bottom, has never been changed. These chains are only inspected to about 80 feet and semi-annually. TX 177.

Looking at exhibit J, a picture of the Paganelli, Sanchez pencilled where the transducers are dropped. TX 179. The tub located at the forefront is a cooling tub where the transducer is placed in the tub to cool down prior to being placed in the well for testing. TX 180. On exhibit K, Sanchez marked the center well where the transducers are placed into Lake Cayuga for testing. In the background of the photo is a group of transducers being readied for testing. TX 181. Sanchez stated that the picture marked exhibit J closely resembles what the Paganelli looked like on December 20, 2000. TX 182. On the same exhibit, Sanchez stated that an individual on the right hand side would serve as a test engineer and that is where Lehman and Morganti would work. TX 182. He further stated that this barge is not used for anything other than testing sonar. TX 183. Further, he is not aware of any plans for moving this barge in the future; there are non-navigational buoys on the Paganelli which are used for identification of the barge's location. The barge itself, however, is not registered with the Coast Guard. TX 184. The barge does have electrical power delivered from shore by a line at the bottom of the lake. TX 184. It is Sanchez's understanding that Lockheed has an easement to run the line from the bottom of the lake to the barge for both electricity and telephone service. TX 185.

Sanchez testified that there could be anywhere from two to four people on the barge during testing but that typically just two people would suffice. TX 186. Testing is typically not done at night. TX 186. The barge is usually in use from 6:00 a.m. until about 5:00 p.m. and it is typically used as a work platform only. TX 186.

On re-direct examination, Sanchez stated that the barge requires a permit from the state which is issued annually. TX 187. Further, he stated that the barge is permanently connected to the chains below the mooring buoy. However, he also stated that the barge could be unhooked, although there are no plans for such activity to his knowledge. TX 188. Sanchez also testified that the barge has bathroom facilities with hot and cold water but no shower. TX 190. He further stated that the galley has an oven, sink, refrigerator and microwave. TX 190.

Upon seeing exhibit C-5, Sanchez identified it as a Lockheed publication called "Maritime". TX 191. He stated that it was published in 2000 as well and that it comes out regularly. TX 192.

Sanchez stated that the risk of drowning is possible on a transport from the shore to the platform. TX 196-197. Further, he stated that outside of Morganti's drowning, there has never been another at that location. TX 197.

Testimony of Lee Agard

At the hearing in New York, New York on May 3, 2002, Agard testified that he has lived in the area of Cayuga Lake for fifty-seven years and that he works transporting material for Lockheed-Syracuse. TX 201. He has been solely responsible for operating the Little Toot water craft for twenty-one years. TX 202;203;205. After graduating from High School, Agard stated that he farmed before starting at Lockheed. TX 202. He stated that he worked with Morganti for fifteen years. Similarly, he stated that he worked with Lehman in the same capacity. TX 202. He testified that he was on the Little Toot when Morganti slipped into the water; he attempted rescue. TX 203. He described the Little Toot as being 32 feet long with a 10 foot beam on it with an enclosed cabin, diesel motor. TX 204. He further stated that it is typically docked at a slit at Portland Point on the shore of Lake Cayuga. TX 204. He depicted the slit as gated but unlocked. TX 205. He further stated that the Little Toot is at the Paganelli when it is not docked at Portland Point. TX 205. He stated that outside of the Little Toot going to the Meyer's Point Marina once every five years for painting, it remains at either the Portland Point slit or Paganelli. TX 205.

He described his position with Lockheed as transporting material out to the Paganelli which comes down by truck. TX 206. Upon arrival at Portland Point, a Lockheed truck driver moves the transducers in sets of nine to a pallet from the truck via forklift. They are then set onto the Little Toot via a two ton crane. TX 208. He stated that this occurs twice a week. TX 208. He stated that they generally test 20-25 transducers a week. TX 208. From the point at which the truck drops them off at 9:30 a.m., he stated that they load everything onto the boat, take them out, and unload the transducers onto the platform. TX 209. He testified that it usually takes about five minutes to get from Portland Point to the Paganelli and that he usually ties up the Little Toot to the Paganelli. TX 209.

Agard stated that he usually does the loading and unloading by himself with the use of the two ton crane. TX 210. He stated that this was the practice on December 20, 2000. TX 211. Once the transducers were loaded onto the Paganelli, he stated that he would move them one by one and by hand onto the well area. TX 212. In order to place the transducer into the water one at a time, he stated that they used a jib crane. TX 212. Agard stated that all of the movement of the transducers from Portland

Point is done by him alone; both Morganti and Lehman were not involved in this process. TX 213. At the same time, he stated that he was never involved in the computer work that they did while testing. TX 214.

He testified that typically he would get to the dock around 8:00 a.m. The delivery truck would arrive around 9:30 a.m. and Morganti would arrive around 10:00 a.m. He stated that he would have a transducer in the water by the time Morganti arrived. He stated that all of the movement of the transducers to the testing site and the setting up of the transducers for the computer testing was his responsibility. TX 215. He stated that it generally takes seven hours to finish testing all of the transducers for the day. During those seven hours, he stated that he is moving equipment around and getting them ready for testing. TX 216. However, he does not work in the actual testing procedure. TX 217.

As he depicted, Agard stated that it takes about an hour to test one transducer. TX 217. During that hour, he stated that he walks around the barge while Lehman works on the computer at the test station. TX 217. He stated that Morganti occasionally helped him and would drive the Little Toot out to the platform. TX 219. This was acceptable to Agard, as everyone should be able to operate the boat in case something happened to him. TX 220. He stated that he was friendly with Morganti and knew him for 15 years. TX 220. In addition, Agard stated that Morganti would help move stuff around the barge. TX 220.

After the testing for the day was complete, Agard stated that he and Morganti would leave the barge platform and go back to Portland Point without any equipment because the truck would usually come the next day. TX 220. On the days where no testing occurred, he stated that he would go out there and move equipment back to shore. TX 222. Additionally, he stated that he would maintain the platform on non-testing days. TX 222.

On cross-examination, Agard testified that Morganti would occasionally help move equipment both on the shore side as well as on the platform. TX 223. He stated that Morganti would do this voluntarily. TX 224. However, while on the Paganelli, Agard stated that he would hook the cables to the transducers before putting them into the water. TX 224. He stated that this was a critical part of the test. TX 225. Agard testified that he and Morganti were a team and that neither could do their job without the other. TX 225. However, he stated that no one supervised or checked their work. TX 225. If there were things that had to be sent back to shore, either Lehman, Morganti or he would place it on the Little Toot. TX 226.

At the Portland Point facility, Agard stated that he and Morganti would tie up the Little Toot as it came in from the platform. TX 227. The same occurred when reaching the Paganelli. TX 228.

On re-direct examination, Agard stated that it was his job to drive the boat, get the transducers on the boat to the platform into the testing area and back out again, and make sure that the transportation of the units was accomplished correctly. TX 229. He further testified that it was not Morganti's job to do any of these tasks, although he may have assisted him over the course of their fifteen years together. TX 229.

Testimony of Marc Lehman

At the hearing in New York, New York on May 3, 2002, Lehman testified that he has worked for Lockheed - Syracuse since 1966. TX 230. As of December, 2000, he stated that he worked as a systems analyst. As such, he verified that data that was coming out of the test facility at Cayuga Lake was valid and reasonable, while also looking for trends in failure analysis and analyzing data. TX 231. He testified that he has been working in this capacity as a test engineer since 1978.

According to Lehman, at the time of Morganti's death, they both performed the same job at the Paganelli. TX 232. He testified that he does not operate or load transducers to/from the Little Toot. TX 233. He further stated that he does not set up the transducers within the testing well. TX 233.

Lehman stated that he has known Agard since 1982, when Agard started at Lockheed. He said that Agard operated the boat, tied and untied the vessel, etc. He stated that he was never told that he had to operate the Little Toot or load/unload materials by anyone. TX 234. However, he stated that he did do these things on occasion by his own volition. TX 234.

Lehman described a transducer as a mechanism which transposes electrical energy to acoustic energy. The transducers which he worked with on the Paganelli were length expander transducers designated as TR343. TX 235. He stated that these were the only types of transducers being manufactured by Lockheed at the time he and Morganti were testing. He further stated that Morganti tested these transducers from November 1998 - November 2000.

According to Lehman, Lockheed developed these transducers for use only with the United States Navy sonar systems. TX 236-237. He stated that both he and Morganti were cleared to work on these classified projects. TX 238. Also, he stated that Lake Cayuga was a desirable place to test these transducers because it does not have any bumpy layers to reflect the acoustic energy back into the transducers. TX 239. Further, he stated that the testing is done at about 75 feet and can best be characterized as a type of quality control test of the transducers prior to their being sent out. TX 240. He believes that they test 100% of the units they build and that the

selection of Lake Cayuga as the test site was made by Lockheed and not the Navy. TX 241.

He described the actual testing as involving two types of tests. The first type is a transmit test for sound pressure level in the water for a particular drive level into the transducer. TX 242. The second test receives sensitivity based on voltage being sent out of the transducer. TX 242. He stated that during all of these tests, he is sitting at a computer terminal. TX 243. After looking at exhibit J, he stated that the computer work station remains similar to that depicted in the photo as well as that worked on by Morganti. TX 243.

Regarding interaction with the computer, Lehman stated that he first tells the computer the type of test he wishes to perform, and then it responds with a question such as serial number, test type, or horizontal distance. TX 245. He stated that the test data is loaded by the computer. TX 245. Therefore, he essentially does no other work than operate the computer at the computer terminal while running the approximately one hour long test on each transducer. TX 246-247. At the end of each test, the computer prints out a hard copy of the test results. TX 248. Later and typically in the Syracuse office, the results are reviewed. TX 249. Lehman testified that his job, as he has described it, is no different than that performed by Morganti, while on the platform. TX 249. Lehman stated that there is little discretion involved with running the computer programs. TX 250. Essentially, the code is written and no one is to alter the computer code with the testing program. TX 250.

According to Lehman, Morganti and he spent about 30% of their time on the platform with the remaining time being spent in the Syracuse office processing the data. TX 251. As a result of the work in the lake, Lehman stated that he then makes his determinations regarding whether a unit has passed specification back at the Syracuse office. TX 252. Regarding Morganti's job, Lehman stated that he did not actually work with him when he was in Syracuse but would occasionally go to meetings and discuss what each was doing. Lehman stated that Morganti was quality control for the people that built those length expander transducers. Therefore, he was very familiar with every operation that the production people did and every floor test that had to be done in Syracuse. TX 253. He stated that these floor tests were similar to what was being done on the platform out on the lake in that he would troubleshoot in case of failure or suspected failures. TX 254. However, Lehman stated that Morganti was not, in any way, building the units. TX 254.

On cross-examination, Lehman stated that when he was out on the Paganelli, he was rarely out there with Morganti at the same time. TX 256. The transducers that were being tested on December 20, 2000 were the ears for the 53C system as part of SQQ89. As such, there is no non-maritime application for that sonar system. TX 257. Further, he again stated that characteristics which make Lake Cayuga desirable for this

type of testing are: depth and the absence of boundaries. Temperature is a minor factor. TX 257.

Lehman testified that on the land site in Syracuse, he was reducing data that was taken at the boat. Testing needed to first be conducted on the lake before any work could be done at the Syracuse site. TX 259. With regard to exhibit K, Lehman marked everything that was no longer on the platform since the photo was taken in 1982. TX 261. He stated that the testing of transducers today results in the configuration of the well depicted in exhibit K being largely the same. TX 264. He further stated that for purposes of testing, he remains in the immediate area in front of the computer. TX 266.

On re-direct examination, Lehman testified that the transducers being tested were for combat weapons and not for navigation of the vessel. TX 266.

Deposition testimony of Joseph Donovan

Donovan testified that he did not know Morganti or his family, nor does he have a personal stake in the outcome of this matter. TR 5. He further stated that he is a Section Superintendent with the New York State Canal Corporation, in charge of the New York State Canal between Cayuga County to Wayne County or as far as the Monroe County line and Seneca Lakes. TR 7. He stated that he has roughly sixteen employees underneath him, as well as the supervision of ten locks and a few small vessels. TR 7. The employees are responsible for lock maintenance, channel maintenance, drain maintenance as well as a maintenance vessel. TR 8. The locks under his control are in the Clyde River, Seneca River, and the Seneca and Cayuga Lakes. TR 8. He stated that there are four locks on Cayuga Lake and a double lock at Seneca Falls. TR 8. He further explained that a double lock is one that ties two separate locks together. TR 9. A lock is used to get a vessel from one place to another or from a lower level to a higher level of water; it is used to get around waterfalls, rapids or damns. TR 9.

He testified that there is one lock at the end of Cayuga Lake named CS-1. TR 10. This lock can handle a vessel 300 feet long, 44 feet wide, and drawing 10 feet of water. TR 10. This means that a vessel drawing 10 feet of water can pass without hitting the bottom of the lake. TR 11. He stated that they warn vessels requiring greater than 10 feet of water of the fact that they are at risk of scraping the bottom of the lake. TR 12. He stated that vessels that require greater than 10 feet of water have come into the lake over the past 10 years. TR 12. However, he stated that over the past 2 years, there has not been a vessel greater than 10.5 feet that has come into the lake. TR 13.

Over the course of his 32 years with the canal authority, Donovan stated that he has served as an oiler on tug boat, an engineer on a tug boat, a tug boat captain, a floating plant supervisor and finally, a section superintendent. TR 14. He stated that in the 1920's-1930's, there were mostly tugs and barges that came through the locks. TR 14. He further testified that, today, mostly pleasure crafts, hire boats and tour boats, as well as the occasional Navy barge, will come through CS-1. TR 15. He stated that the locks are open for the season that begins the first Monday in May to approximately the first Sunday in November. TR 16. Donovan stated that they keep a record of the number of vessels that pass through the locks and the type of vessel that passes. TR 18-19. Among the various types of vessels that pass through the locks are hire boats, state, tour, commercial and pleasure boats. He stated that hire boats are those that are hired by private persons; tour boats are vessels offering tours or sightseeing; state vessels are those owned by the New York State Canal Corp. or another government entity; commercial ships are those that carry goods for hire; pleasure boats are canoes, jet skis, personal pleasure boats, etc. TR 19-20;22;24. He stated that when a vessel enters a lock, the vessel operator contacts a person who works for his agency. This person then checks the vessel for a pass sticker; the inspector does not board the ship or inspect the vessel. TR 22. Donovan stated that he reviews and signs off on these records weekly. TR 23.

Over the course of the six month 2000 season, Donovan stated that between 2000-3000 boats passed the CS-1 lock. TR 25. Donovan stated that, after looking at the filings, he could total the number of commercial vessels that passed through the CS-1 lock. TR 26. After reviewing the form, Donovan noted that on June 23, 2000, a vessel named Cat Walk LAZ 14556064 entered the lake on a 24-hour commercial service permit. TR 28. That is, this vessel can operate 24 hours a day so long as 24 hour notice has been given before entering. TR 28. He does not remember what this particular commercial vessel entered the lake for, but did note that two research vessels entered the lake that season to look for persons other than Morganti who drowned at Seneca Lake. TR 29. He testified that there are clearance papers which would be able to say for certain that on a particular trip through the lock, a particular ship was performing a certain function. TR 32.

Donovan stated that, at the present time and going back four years, there are no vessels that bring goods or cargo in and out of the lock as a source of income or business. TR 37-38. He stated that four years ago there was one barge carrying a load of salt and in the late 1970's some vessels moved commercial heating oil from Canada down to Ithaca and Watkins Glen. TR 38. He further stated that in the 1970's, salt used to be moved along from Canada down to Watkins Glen. TR 38. However, he stated that salt was no longer moved on the lake as a result of the locks being closed in the winter. TR 41. He also stated that in the 1960's, there used to be cement barges that moved along Cayuga Lake, but that hasn't happened in over forty years. TR 43. Finally, he stated that in the 1980's, there used to be commercial molasses and feed

shipped along the lake, but the plants producing these items have since shut down. TR 43. Donovan stated that these movements along the lake have not been replaced and he does not recall any movement along the lake for commercial purposes in recent memory. TR 44.

On cross-examination, Donovan stated that when he spoke of commercial activity, he was referring to the movement of passengers and/or the carriage of goods. TR 45. He stated that this is distinguishable from vessels that are hired to carry materials for contractors, which are known as for hire. TR 46. Finally, he stated that commercial activity that is represented by for hire and tour boats are those that carry passengers as well. TR 46. He would approximate that the number of tour boats that were for hire in the 2000 and 2001 seasons were in the range of 150. TR 46. He noted that the canal system is not, nor has it ever been, open year round. TR 47.

He testified that he is familiar with the Liberty boat, operated out of Syracuse as a party boat for hire. TR 48. He also stated that he knows of the Me to You boat, which is used for tours in New York State and up and down the Cayuga and Seneca Lakes. It does one to two tours a month. TR 49. He stated that for hire charter boats are those boats that are hired for a period of time to go up and down the canal. TR 49. He stated that Mid-Lakes Navigation is out of Macedon, NY. TR 50. He stated that some out of state boats come into the Erie Canal, but not on to Lake Cayuga. TR 50.

For New York State Canal Corporation reasons, he stated that there is a guaranteed 10 feet of draft. TR 52. However, he stated that there are about 10-15 spots across the whole state that have to be dredged every year to maintain the 10 feet guarantee. TR 52. He stated that they sometimes use unnatural dredging procedures which involve a dredge coming through and pushing out any silt. TR 53.

Donovan stated that a barge can go from Cayuga Lake, out through the canal system and into the Atlantic Ocean. TR 54. He also stated that a barge can go from Cayuga Lake up to Lake Erie and down to the Hudson into New York City and then out into the Atlantic Ocean. TR 55. In his opinion, these were the routes that the canal system was built to serve. TR 55. In addition to the products mentioned earlier, Donovan stated that coal was also shipped along the Lake on a regular basis in the 1950's. TR 56. Much of the reasons why these materials are no longer shipped is because of the advent of the pipeline, railroad and trucking systems. TR 57. He stated that he is not aware of physical hindrance that would prevent the shipping of coal or salt on Cayuga Lake. TR 57

Donovan went on to testify that the Coast Guard has jurisdiction over Lake Cayuga and that documented vessels are subject to Coast Guard inspections and regulations. TR 58. He believes that for hire and tour boats are commercial vessels that are inspected by the Coast Guard. TR 58.

Additionally, the Coast Guard investigates accidents on the lake, but Donovan is not sure whether they investigated Morganti's fatal accident. TR 59. Donovan described the accident as occurring on a floating barge. TR 60. He stated that they consider anything that floats on the water as a floating barge. TR 60. He has been told that the barge on which the accident occurred was a floating barge rather than anchored because it was not permanently fixed. TR 60. He has also been told that this barge entered Cayuga Lake through the canal system. TR 61.

Donovan testified that the U.S. Army Corps of Engineers have jurisdiction over Cayuga Lake. With that, they are able to monitor any dredging on the waterway, as well as do any of the dredging. TR 61. If his agency is to do any dredging, he is to first have the permission of the Army Engineers. TR 61. He went on to describe the Cornell Lake Source Cooling Project as a project to draw water from the Lake to use in the Cornell cooling system. TR 62. In order to do this, he stated that a barge pushed by a tug went down the lake though the lock system to pick up cranes and bring cranes back. TR 62-63. He also stated that AES Corporation had talked of running coal up and down the lake, but the plan never materialized for economic reasons. TR 63. He did note that a couple of years ago, a submarine nose came though on a barge to the Dresden Navy Station. TR 64.

Regarding the Beacon Feed factory mentioned earlier, he stated that it is now a marina and repair shop as well as a work barge. TR 65. However, when it was a feed plant, it was used to unload animal molasses for refining. TR 66. Also, he stated that a few years ago, a few barges pushed by tugs came though the canal with beams for the Route 13 bridge repair as well as for a water treatment plant repair job in Fayette, NY. TX 66. As for the New York State Canal Corp., he stated that they have a dredger, a tug and a barge that is converted into a work house. TR 68. Additionally, he stated that the agency has a self-propelled barge that has a self-contained crane on it that is used for navigation aids and repairing the navigation aids. TR 68. He stated that it is a 240 ton vessel, approximately 175 feet long and 35 feet wide, drafting nine feet. TR 69. Also, he stated that the agency has the Durick Boat 6, which houses the dredging equipment and includes a hydraulic crane used for setting up buoys on the lake, lake maintenance and barge repair. TR 70. He stated that this vessel goes anywhere in the state where it is needed. TR 70.

On re-direct examination, Donovan testified that Beacon Feed is located on the north end of the lake. He stated that growing up on the lake, he saw cargo being shipped into the lake as limited to coal, gasoline, cement, building supplies, lumber; the sole outbound cargo was salt. TR 72. The only change to the physical state of the lake since then would be the lack of places to off-load cargo in Ithaca and Watkins Glen. TR 72.

Donovan also testified that there were off-loading facilities in Ithaca that were now being leased by Cornell University for academic purposes. TR 73. There is another facility in Ithaca that can be used to off-load if the off-loader brought in their own equipment. TR 74. He stated that there has not been lumber off-loaded on the lake since the early 1930's as a result of the railroad trucking companies' impact on the industry. TR 74.

Donovan stated that the agency vessels are not moved out of New York State unless necessary to work for another state. TR 77. There are no physical restrictions as to moving an agency vessel out of state. TR 85. He stated that some of the barges used in repairing the Route 13 overpass approximately four years ago were from out of state. TR 78. Further, he stated that the AES plant repair was in the early 1990's. In his opinion, the planned dredging of the lake to about 12 feet may increase the amount of commercial traffic. TR 81. He also stated that people have commented that a deeper lake would make it more attractive to commercial traffic. TR 81. However, the lack of places to off-load makes it less attractive to businesses to begin moving materials over the lake. TR 81. Although, he did state that there is nothing restricting these sites from being built other than economic reasons. TR 84.

As for the passenger boats, he stated that some of the boats would have people who paid to go to Florida, but the general tourist boats were not from or going to out of state locales and have not done so in the last few years. TR 83.

Deposition testimony of Thomas O'Brien

O'Brien was deposed on April 11, 2002. He testified that he works at AES Cayuga, 228 Cayuga Drive, Lansing, New York. TR 4. Out of High School, he stated that he majored in forestry at Morrisville Agricultural and Technical School. Subsequently, he entered the U.S. Army as an environmental health technician. Upon completion of his service, he went to work for Smith Corona Marchant as a training specialist and then to Ithaca College as assistant director of life safety services. TR 6. After serving as a safety compliance officer for BOCES, he began working for the New York State Electric and Gas as a health and safety coordinator in 1999. TR 6. He has been working at his current facility for 10 years.

As a health and safety officer, he oversees operations of the Safety Committee within the plant as well as overseeing the fly ash and bottom ash sales. TR 7. He currently works in a coal-fire generating station. TR 10. The station in which he currently works went on line in 1954, with a second unit beginning operation there in 1956. TR 10. He stated that he was employed by both the state Electric and Gas Company as well as AES when they took over in 1999. Since AES took over operations, he stated that the plant is considered a stand-alone business and no longer is a part of the state electric and gas company's fleet of companies. TR 12. He stated

that the plant uses coal to fire the boilers and also uses limestone in order to cleanse the byproducts before releasing them into the air. TR 13. Further, he stated that the plant uses anhydrous ammonia, sulfuric acid, sodium oxdroxide, formic acid, and calcium sulfate. TR 13. There are also by-products including fly ash, bottom ash and gypsum. TR 14. What cannot be marketed is sent to a landfill. TR 14.

O'Brien testified that the plant uses Norfolk Southern in order to bring in coal by rail from Pennsylvania. TR 14. He further stated that coal is imported by truck while trucks are also used to export the gypsum by-product. TR 15. At the same time, coal is not imported by water. TR 15. He stated that over the course of his 10 years at the plant, coal has never been imported by water. TR 15. In his opinion, coal has never been imported to the plant by water. TR 16. Additionally, he stated that the limestone and chemicals used in the plant are all trucked in from Canada. TR 16. Regarding the marketable by-products, he stated that the gypsum is exported by truck only, while the ash is exported by Norfolk Southern. TR 18.

O'Brien testified that he and the rest of the plant workers have input regarding how the materials and by-products are moved in and out of the plant. TR 18. He stated that there was an exploration of the possibility of barging out gypsum from the plant, but the size of the barge that would make it economically feasible was too large to fit through the locks. TR 19. He approximates this study being done 10 years ago. TR 19. He stated that he is somewhat familiar with the study involved in this decision, but that the impetus for the idea was purely economical. TR 19. He stated that there are currently no on or off-loading facilities that could accommodate the plant's needs in this area. TR 20. In an effort to build them, the plant would have to garner various environmental permits. TR 21.

O'Brien's understanding of the feasibility studies conducted on regarding the size of the barge was that the size would not accommodate the locks' draft restrictions. TR 22. He stated that the idea was to barge limestone in from Canada and barge gypsum out to Canada. TR 23. He stated that he is not aware of the company's decisions regarding possibly barging coal or other plant materials. TR 23.

On cross-examination, O'Brien testified that the study that was conducted regarding the shipping of limestone from Canada and the gypsum going to Canada was not a formal study but rather a few people reviewing information. TR 31. He stated that the head of gypsum sales, Dan Hill, had informed him of the results of these studies over the course of a few conversations. TR 31 - 33. He stated that he was not aware of any test runs on barges through the lakes to see if shipping by barge was feasible. TR 32. He stated that the gist of the conversations with Hill were that the size of the barge required to make any barge shipping of gypsum feasible would not fit through the locks. TR 34. However, he stated that he was not aware of the size of the barge in which they were speaking. TR 35. Further, he testified that he is not aware of

any actual number crunching sessions that may have taken place. TR 36-39. He also stated that he is not aware of the costs of building and implementing docking facilities in the lake but that the company was looking at leasing a barge. TR 40.

O'Brien went on to testify that the market for fly ash has expanded to places within New York state, Pennsylvania and over to Boston. TR 42. Also, he stated that the plant has stand alone coverage for worker's compensation insurance. TR 43. He was unaware of any premiums required if the plant were to begin shipping by barge. TR 44.

Deposition testimony of Stanley Pamel

Pamel was deposed on April 25, 2002. He testified that he has a B.S. in Engineering from Michigan Tech, which he received in 1980. TR 5. Since 1980, he has been with Cargill as a surface superintendent, in charge of handling salt once it comes out of the mine and before it is stockpiled or loaded out to trucks/rail. TR 6. He stated that he works in the Cayuga mine in Lansing, New York. Further, he stated that he is in a position to testify as to whether Cargill ships salt on Lake Cayuga. TR 8. This is because he is involved with coordinating with the people that actually do the distribution work. TR 9.

He stated that Cargill bought the mine in which he works in 1970. He stated that he started out working as a mining engineer. As such, he assessed ground stability, ventilation and the manner in which to extract mineral safely and economically. TR 10. His progression within the company began as an engineer in the engineering department, then as agency supervisor, then surface superintendent, and then underground superintendent. TR 11. He testified that the mine employs approximately 200 people and operate every day of the year around the clock. TR 11. He stated that the mine produced mainly road de-icing salt to be sold to government agencies in New York and Pennsylvania. TR 11. He stated that he had been the surface superintendent for more than two years and that there had been very little customer contact. TR 12. He stated that for the 200 employees on the location, he would be the number two or three person in charge. TR 13.

He testified that the mine uses mining equipment and explosives which are all brought in by truck. TR 14. Additionally, he stated that there are approximately three inventory sites located in Vermont, Pennsylvania and Maryland. TR 15. Salt is brought to these sites by truck and rail, with 70% being transported by truck and 30% being transported by rail. He stated that salt is never transported by barge to any of the inventory sites. TR 15. Instead, he stated that they have one loading area where they load the trucks and the Norfolk Southern rail cars. TR 17. Occasionally, he stated that they will deliver to the New York State Thruway system via truck; they never deliver to this customer by rail or barge. TR 18. At the same time, he stated that the Thruway

will occasionally pick up inventory in the same manner; the Thruway also does not use rail or barge. TR 18. Therefore, Pamel state that barges along Lake Cayuga are not used to transport salt to either inventory sites or customers. TR 18.

Pamel testified that his company also produces and bags salt for retail. TR 19. He stated that the packaged materials are also sent out via truck and rail. TR 19. Thus, he stated that all product from the Cayuga Salt Mine is moved off the facility to customers or inventory sites by truck or rail. Also, he stated that whatever materials that are utilized in the making of the salt at the Cayuga Mine is brought to the facility by truck or rail. TR 20. He believes that when trucking is used rather than rail, it is because the method has proven to be more economically efficient. TR 23. He went on to state that Cargill has never used Cayuga Lake as a general method of transporting salt off the facility. TR 20. However, the previous owners of the mine used the lake to transport salt approximately fifty years ago. TR 21.

Pamel stated that Cargill does not use barge shipping because it is not economically feasible. TR 21. He stated that he believes this to be true because he sees how the salt is shipped. TR 21. He stated that barge shipping cannot compete with the truck and rail rates. TR 21. Although, he stated that in 1998, Cargill cooperated with the New York State Thruway in shipping one barge of materials, weighing approximately fifty tons and equivalent to approximately 60 trucks. TR 23. He believes that the barge was loaded away from the plant because of the lack of loading facilities and sent to Port Albany. TR 23. The plant facilities are no longer serviceable, resulting in the need to load the barge at a facility a quarter mile away. TR 24. Pamel stated that this procedure, as a result of the loading facility, is very inefficient. TR 24. He stated that there are no plans to build a loading facility. TR 25. He further stated that the demonstration provided information that salt could be carried through on Cayuga Lake, but the rates eventually killed the project. TR 27.

Pamel stated that he was not involved in the economic analysis that was used to determine whether or not shipping salt by barge for Cargill is economically feasible. TR 28. However, he stated that he spoke with Mr. Belanger of the North Olmstead, Ohio facility, who was involved in this decision. TR 29. During these conversations, Pamel learned that you could move product and materials over Cayuga Lake, but that the economics were simply not there. TR 29. Further, he stated that after discussions with people in distribution and management, he learned that the rates for shipping by rail and truck were simply better. TR 30.

Regarding the experimental shipping of salt by barge in 1998, Pamel stated that it was just a gratuitous experiment for the New York State Thruway. TR 32. He based this statement on conversations he had with people that were involved in the experiment, including Belanger. TR 32. He testified that he is unaware of any efforts by Cargill to develop the canal system with the availability to sustain commercial traffic.

TR 35. He also stated that the docking facilities that were once used in the 1950's are merely posts in the water now and he does not know whether Cargill has priced repairing them. TR 38.

Following the 1998 experiment, he stated that a report was generated regarding the feasibility of using barge shipping. TR 38. Although he stated that he would be involved in such a decision to ship via barge, he stated that he is unaware of any such plans to further pursue such a plan. TR 40. As far has he knew, Pamel believed that aside from routine dredging, there were no physical impairments that would prevent the use of Lake Cayuga as a shipping alternative. TR 42.

Testimony of Capt. Jack Ross

At the hearing in New York, New York on May 3, 2002, Capt. Ross testified that he is a marine consultant for his own firm in the Pittsburgh area. TR 35. As such, he furnishes various technical services to firms in the marine industry on the river system. TR 35. After High School, Ross stated that he enlisted in the Army and worked in the Army Corps of Engineers. TR 36. He has held licenses to tow and operate commercial as well as passenger vessels. TR 36. He stated that he operated towing vessels up to 8000 horsepower on the rivers, as well as owned numerous towing vessels. TR 37. He further testified that during the 1970's he was the operations manager for a large marine contracting company in Pittsburgh handling bidding and general supervision of all operations. TR 37. On voir dire, he stated that he has not had any Coast Guard issued licenses for fourteen years and only to licenses over the course of his forty year career on the rivers. TR 44. Additionally, he stated that he has never held a master's license or a license to operate on the New York State system. TR 45. Further, he stated that he has only visited Cayuga Lake once and as a tourist. TR 45.

Regarding the inland water systems and locks, he stated that one of his major job activities is design and permitting of marine structures. TR 49. As such, he stated that he designs docks, bulkheads, mooring structures and the like up and down the rivers. In addition, he stated that he also does safety consulting for clients. TR 49. Regarding navigation on the waterways, he stated that he worked as a relief pilot, receiving officers on boats for weekends at a time. TR 50. Therefore, he stated that he has operated several types of boats as well as those tugboats that he has owned in the past. TR 51.

Regarding his familiarity with the Erie Canal system, he stated that he has researched it recently and spoke with a number of towing pilots who operate regularly on the canal system. TR 51. He stated that he was specifically asked to research an opinion as to whether Cayuga Lake was part of the navigable waters of the United States. TR 52. He further stated that he looked at documentation from the Army Corps of Engineers and the Coast Guard because they are the two agencies directly

responsible for regulating navigable waters. TR 52. He stated that the Corps of Engineers is interested in the structural aspects, navigability maintenance and permitting of structures. TR 52. Further, he stated that the Coast Guard enforces navigation regulations, the movement of vessels and how they are lighted and the signals that they give, etc. TR 52. Upon inquiry, the Corps of Engineers, he stated, sent him a list of navigable waters in New York State. Also, the Coast Guard sent him a letter telling him in detail what particular regulations that are enforced and that they consider Cayuga Lake as a navigable water. TR 53. These reports were admitted into evidence. TR 54. Ross went on to state that these agencies regulate navigable waterways. TR 55.

Ross testified that the two tests for navigability are first, if the waterway is physically capable of supporting commercial navigation in some form, and secondly, whether it provides a continuous source for interstate commerce. He stated that Cayuga Lake qualifies in both respects. TR 56. He stated that the depths of the lake exceed 400 feet in a few places, while the lake is 38 miles long and 2 miles wide. TR 57. Ross explained that Cayuga Lake connects to the Erie Canal through lock 1, which is 300 feet long, 45 feet wide and 12 feet deep. TR 58. When compared to other locks, he stated that these dimensions are smaller than those on other river systems like the Kentucky river. TR 60. Further he described how boat traffic would proceed from Cayuga Lake through the CS-1 lock and onto a number of destinations, including Lake Erie, Lake Huron, Lake Michigan, the Illinois waterway, the Mississippi river and essentially anywhere in the world.[2] TR 63.

Ross testified that the buoys, navigation lights and day markers that the Canal Corporation maintain on the canal system are virtually identical to those that the Coast Guard maintains on other waterways. TR 64. Therefore, he stated that there is nothing that would prohibit a commercial vessel or any kind of boat from proceeding from Cayuga Lake though the Erie canal system. TR 64.

According to Ross, commercial navigation includes both the carriage of cargo and passengers. TR 64. He also stated that there is very little barge cargo traffic on the Erie Canal system simply because it's more economical to move it in other ways. TR 66. Although, he stated that the possibility exists to move large cargo. TR 67. Regarding specifically Cayuga Lake, he stated there is limited cargo traffic in addition to the 317 tour boats that passed through the Cayuga/Seneca canal locks in the 2001 season. TR 67-72. Further, he stated that since Cayuga Lake is part of the canal system, any vessel that can operate on the system can enter Cayuga Lake. TR 75. He

---

[2]However, it is questionable as to whether Cayuga Lake would qualify as navigable under Ross' second prong because of its seasonal nature. The Erie Canal system's locks are closed in the winter months and is not a continuous source for interstate commerce.

stated that the Canal Corporation sent him a list of the towing companies that have purchased licenses for the coming year to move tugs or barges on the Erie Canal System and it included 31 firms. TR 76.

Ross stated that Cargill Corporation shipped a barge of materials out of Cayuga Lake in 1998, pushed by a tug from Empire Harbor Marine of Albany, NY. TR 79. He stated that the barge was 211 by 43 and loaded in 1800 tons of salt, but if loaded all the way down, it could haul 3000 tons of salt. TR 79. The reason for not loading the barge to capacity was because the barge would then draw about 15 feet of water, thereby not allowing it to pass anywhere within Cayuga Lake. TR 96. He stated that Cargill concluded that operationally, the shipment was successful, but economically it was not worthwhile primarily because there was no way to have someone use the barge on the way back to the lake. TR 80. He based this conclusion on a letter from Keith Belanger of Cargill to the Thruway Authority. TR 80. However, Ross concluded that Cayuga Lake is navigable and capable of sustaining commercial traffic. TR 82.

On cross-examination, Ross testified that he was assigned to investigate whether Lake Cayuga was a navigable waterway. TR 84. Further, he stated that it is his opinion that since the Erie Canal System is navigable, then Cayuga Lake is also navigable. TR 85. He based this conclusion on the David Ball standard, which he stated is identical to Federal Regulations. TR 86. He stated that the opinions of the Army Corps of Engineers as well as the New York Canal Corporation are relevant to the issue of navigability as it is related to the Longshore Act and was therefore assessed in making his conclusion. TR 87. However, he also stated that he could not name a cargo or passenger vessel that traveled interstate from Cayuga Lake. He stated that he is basing his assessments on the fact that ships traveling on Cayuga Lake have the possibility of traveling interstate, although it admittedly has not happened in recent years. TR 88. He also admits that the Cargill shipment was done to explore the possibility of re-establishing commercial traffic on the canal. TR 89. He also stated that since the Cargill shipment in 1998, there has not been any other commercial traffic on the lake. TR 91.

Ross determined that Morganti died as a maritime employee, partially because he died while on navigable water. TR 91. Although, he admits that he did not spent a large amount of time handling the loading and unloading of cargo. TR 92.

Prof. Richard Schuler

At the hearing on May 3, 2002 in New York, New York, Schuler testified that he is a professor of economics and civil environmental engineering at Cornell University and has been employed in this capacity for thirty (30) years. TX 99. He stated that he has taught primarily economic courses, at all levels, over the course of this period. TX

100. He stated that he would be testifying about the recent and likely future economic activities surrounding Cayuga Lake and that interrelationship with freight and passenger traffic on the lake. TX 101. He will describe the economic consequences that emerge from the lake with regards to modes of transport. TX 102. He stated that he does not have a Master's license, but has operated motor boats on Cayuga Lake. TX 101. However, he stated that he has not ever passed through a lock or been on any portion of the New York State canal system. TX 102. He stated that he teaches about the value of waterborne transport. TX 102.

Schuler stated that he is not familiar with the Morganti family or the situation involving Morganti's death other than newspaper articles. TX 104-105. He stated that he has a house near the lake and that he is familiar with the going at the lake over the course of the past 30 years. TX 105. He also stated that he was asked to provide an analysis of the recent and likely future of commercial freight traffic on Cayuga Lake that might be of an interstate nature. TX 105. He described Lake Cayuga as a natural area where the lake itself plunges extremely deep in certain areas while becoming shallow in other areas. TX 106. He stated that the topography of this lake effects its economic viability in relation to shipping in that there are not many sites where one could operate a business in addition to the fact that a number of vacation homes and vineyards have been built up along the lake over the past 40 years. TX 107. He stated that there are CSX railroad tracks that operate alongside the eastern edge of the lake and that a train a day runs along those tracks to AES Electric Generating station delivering coal. TX 108-109. The AES station uses lake water for cooling purposes, but it does not ship on the lake. TX 109.

Schuler believes that, given the topography of the lake, there is presently no docking infrastructure for commercial cargo around the lake. TX 110. Further, he stated that there are no commercial fueling stations on the lake and no docks for commercial vessels. TX 111. The Erie Canal System, in his opinion, is the major east/west link going from Albany to Buffalo with a number of links to it. The system goes through Oneida Lake, through the Oswego canal and into the Hudson river. There is also a port in Albany where you can go north on the Hudson River and into the Champlain Lake and St. Lawrence. TX 112. Finally, he stated that there is a spur that comes down that serves both Cayuga lake and Seneca Lake.

Most of the evidence unearthed by Schuler indicates that lake traffic had virtually disappeared by the turn of the century into the 1900's. TX 113. He stated that currently, there is no freight tonnage being moved on the lake. He based this opinion on talking to people that are knowledgeable about such information, such as those in heavy construction equipment moving. TX 116. He investigated a Cornell University project which installed a pipeline to the bottom of the lake for cooling purposes, but found that the University used trucks and rail to moves the massive pipes into the area. TX 117.

Regarding natural gas and petroleum, pipelines have become the transportation of choice. TX 118. Just as in other areas, Schuler stated that trucks have become the transportation of choice in the region, in addition to the fact that the University and other technology spinoffs in the area have joined tourism as the dominant industries. TX 119. Schuler adds to this that although barge shipping is the most inexpensive when looking at it with regards to actual tonnage, the fact of the matter is that both truck and railroad shipping is faster and requires less costly, if any transfers to other modes of transportation upon approaching the final destination. TX 120.

On cross-examination, Schuler testified that Lockheed-Syracuse is using the lake five times a week, year-round to make money testing sonar equipment for the U.S. Navy. TX 123-124. However, there have been times when commercial traffic had been much greater. TX 129. He stated that there is nothing about the physical characteristics of Cayuga Lake which today would in any way impair the resumption of commercial traffic. TX 129. He believes it is the economy that is the problem; modern industry simply has no use for commercial traffic on the lake. TX 129. Although he stated that the lake is very vital to the area. TX 131.

Schuler admitted that the whole interstate waterway system has very little economic value for freight hauling purposes. TX 131. He stated that he is only testifying as to barge traffic on Lake Cayuga, but he admits that there is passenger and ferry traffic on the lake that could be considered commercial traffic. TX 136.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to be covered under the Act, an employee must meet both the situs and status requirements of Sections 2(3) and 3(a) of the Act. *See* 33 U.S.C. §902(3) (1982) (*amended* 1984); 33 U.S.C. §903(a) (1982) (*amended* 1984). These sections address the issue of coverage. Situs refers to the place of performance and status refers to the nature of the work performed. Some decisions have referred to the requirements of situs and status as subject matter jurisdiction. *See Ramos v. Universal Dredging Corp.*, 10 BRBS 368 (1979); *Mire v. The Mayronne Co.*, 13 BRBS 990 (1981). However, the United States Court of Appeals for the Ninth Circuit reversed the Board's decision in *Ramos*, *supra*, and held that questions of status and situs refer to coverage under the Act, not subject matter jurisdiction. *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981). This holding is especially meaningful in this matter.

I raise this issue at the outset of my discussion because the parties have exhaustively argued the standard by which I am to make my decision based on the applicability of the Section 920(a) presumption to issues of jurisdiction. I agree with the Employer/Carrier's argument that the Benefits Review Board (Board) has consistently

held that the presumption does not apply to the issue of jurisdiction. *See, e.g., Elia v. Mergentime Corporation*, 28 BRBS 314, 316 (1994); *Wynn v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 31 (1983); *Boughman v. Boise Cascade Corporation*, 14 BRBS 173 (1981). The Second Circuit further elaborated on the issue in *Fleischmann v. Director, OWCP*, 137 F.3d 131 (2d Cir. 1998), stating that the Section 920(a) presumption applies to questions of fact underlying the coverage issue; it does not state that the presumption applies to legal issues, such as jurisdiction.

Thus, the burden of showing coverage is on the Claimant here; there is no presumption of coverage. *See Boone v. Newport News Shipbuilding and Dry Dock Co.*, 34 BRBS 311 (2000) *quoting Stone v. Ingalls Shipbuilding*, 30 BRBS 209, 210 n3. Claimant must show, by a preponderance of the evidence, both that her deceased husband was engaged in maritime employment and that coverage was not excluded under the section 902(3)(A) clerical work exception. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *See Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den*. 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

The Act provides compensation for the death or disability of any person engaged in "maritime employment," if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel. *See* 33 U.S.C. § 902(3) (1988); 33 U.S.C § 903(a) (1988). Thus, a worker claiming benefits under the Act must satisfy both a "status" and a "situs" test.

To meet the situs requirement, the claimant's injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. §903(a) (1988). To meet the status requirement, the claimant must show that the victim is "engaged in maritime employment." Id. at 902(3). To interpret the status requirement, the United States Supreme Court has referred to the criteria of Section 903(a) that the employee be involved in "loading, unloading, repairing, dismantling, or building a vessel." *See Herb's Welding, Inc. v. Gray*, 105 S.Ct. 1421, 1427 (1985).

In this matter, the Claimant has established that Rocco Morganti was injured and died on navigable waters and that Employer/Carrier has failed to provide substantial evidence to the contrary. Claimant has thereby satisfied the "situs" requirement of the

Act. The Second Circuit has held that a body of water is considered navigable, "if it is presently used, or is presently being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water." *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2d Cir. 1999). As Claimant points out, this standard was first explained in *The Daniel Ball*, 77 U.S. 557, 563 (1870), the source of the current standard:

> A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in the or ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. *Id.*

The crux of this standard, as applied by the Act, is the fact that the body of water must be presently supporting, or capable of supporting, interstate commerce. *See Elia v. Mergentime Corp.*, 28 BRBS 314, 318 (1994).

The arguments by the parties offer two interpretations of the capacity to support interstate commerce. Employer/Carrier hinges its argument on the idea that the capacity to support interstate commerce lies not only in Cayuga Lake's physical capacity, but also in its current economic capacity. However, in arguing the merits of using the lake's current economic situation, Employer/Carrier fails to address the lake's physical state. Employer/Carrier presents the Second Circuit's opinion in *Leblanc v. Olsen*, which held like the Board in *Elia*, that the notion of navigability should not be determined with reference to the waterway's historic state, but rather it's present state. *See Leblanc*, 198 F.3d 353 (1999). In coming to this conclusion, the Second Circuit quoted the Eight Circuit in *Livingston v. United States*, where that court stated:

> The closing of waters to commercial shipping should likewise have the effect of eliminating admiralty jurisdiction over them, In other words, the concept of "navigability" in admiralty is properly limited to describing a present capability or the waters to sustain commercial shipping. *Leblanc*, 198 F.3d at 358-359 (quoting *Livingston*, 627 F.2d at 169-170).

Therefore, Employer/Carrier argues that according to the holdings in *Elia* and *Leblanc*, Cayuga Lake must be presently capable of supporting interstate commercial shipping

activities in order to be considered a navigable waterway.[3] However, Employer/Carrier extends this argument to include a physical and economic capacity to do such activity. That is, Cayuga Lake should be able to currently offer some evidence of commercial shipping that is actually happening on a regular basis. Employer/Carrier points to the fact that testimony by Messrs. Donovan, Pamel and O'Brien clearly provide evidence that there is currently a complete lack of interstate commercial shipping on Cayuga Lake. Per Employer/Carrier's argument, this lack of commercial shipping proves that Cayuga Lake should no longer be considered navigable. With this contention, I cannot agree.

The test for navigability is firmly rooted in a body of water's physical ability to allow for commercial activity. As Claimant notes, virtually every other responsible authority that has issued a finding of non-navigability has done so only where the physical conditions of the waterway made the waterway unusable for interstate commerce. *See e.g., Alford v. Appalachian Power Company*, 951 F.2d 30, 33 (4th Cir. 1991)(dammed, lockless lake lying wholly within the State of Virginia"); *Hardwick v. Pro-Line Boats, Inc.*, 895 F.Supp. 145, 148 (S.D. Tex 1995)("lake Houston is entirely landlocked and is not capable of being used for interstate commerce"); *In re Bernstein*, 81 F.Supp.2d 176 (D.Mass.1999)("because of numerous lockless dams and hydroelectric stations, it is impossible to travel by any type of watercraft"); Reynolds v. Bradley, 644 F.Supp.42, 45 (N.D.N.Y.1986)("land-locked body of water ... incapable of sustaining travel by boats of any size.") At the same time, several appellate cases have expressly considered instances wherein commercial activity on a waterway has diminished to practically nothing but wherein the waterway retained the physical capacity for commerce. These cases all found that the body of water in question was navigable and directly rejected the standard Employer/Carrier currently proposes. *See Finniseth* 712 F.2d 1041; *Mullenix*, 984 F.2d 101; *Richardson*, 641 F.2d 314.

In this matter, the evidence presents that Cayuga Lake has the physical capacity for seasonal interstate commerce. The lake, lock and canal are part of the Erie Canal System, which, according to the testimony of Joseph Donovan of the New York State Canal System, makes it accessible to any destination in the world.[4] Additionally, Cayuga Lake, lock and canal (collectively the "Cayuga waterway") recently handled a barge salt shipment of 1800 tons. Donovan TR 78-81. Further, the Cayuga waterway can handle over 90% of the existing fleet of vessels that traverse the inland waterways. Donovan TR 82. And finally, Employer/Carrier acknowledges that from a purely

---

[3]I note that on December 20, 2000, the date of Morganti's death, the Erie Canal locks were closed for navigation. The Erie Canal closes from the first Sunday in November until the first Monday in May. *See* Donovan TR 15-16.

[4]I have taken judicial notice of the fact that the Erie Canal System is a navigable waterway.

physical standpoint, commercial vessels are capable of traveling into and out of Cayuga Lake through the Erie Canal System. *See* Employer/Carrier's brief at 32. Considering the complete lack of precedent stating that a body of water should be subject to an economic test for viability in addition to the already well-settled physical test, I find that Cayuga Lake meets the Act's situs requirement as a navigable waterway and that Employer/Carrier has not offerred substantial evidence to the contrary.

Consequently, Claimant must now satisfy the second prong of the test and prove that Rocco Morganti was a covered "employee", thereby satisfying the "status" requirement under the Act. The parties present three arguments in an effort to prove or disprove status. I will address each argument separately below.

The first method by which the parties discussed status under the Act revolved around Section 2(3), which provides a definition for "maritime employee."[5] However, Morganti cannot be considered a maritime employee under a strict reading of this definition. He was employed as a test engineer while at the Paganelli, and as a trouble shooter for certain test equipment while at Lockheed Martin-Syracuse's facility. As such, his job does not fit within the enumerated positions from Section 2(3), i.e. longshoreman, harbor worker, ship repairman, shipbuilder or ship-breaker.

---

[5] 33 U.S.C. §902(3) defines "employee" as follows:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include -
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security or data processing work;
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum or retail outlet;
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such work marina (except for routine maintenance);
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;
> (E) aquaculture workers;
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
> (G) a master or member of a crew of any vessel; or
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

Nevertheless, maritime employment is not limited to the specific occupations enumerated in Section 2(3). The Act covers all those whose employment activities are inherently maritime. Further, the language of the act has consistently been given a liberal construction in view of its remedial and compensatory aim. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977). However, the Supreme Court in *Herb's Welding, Inc. v. Gray* placed some boundaries on the interpretation of maritime employment. 470 U.S. 414 (1985). The Court stated that the term "maritime employment" should not be read to eliminate any requirement of a connection with the loading or construction of ships. *See id.* at 423-424. Further, the court explained that, "the Act does not cover employees who are not engaged in loading, unloading, repairing, or building a vessel ..." *Id.* at 424. For added perspective on this issue, the Third Circuit has stated that and employee's activities must be "an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Id.* at 67. The argument presented is that Morganti provided an essential function for a maritime production entity and in furtherance of a commercial maritime activity; workers with far more tenuous connections to the sea than Morganti have been found to be covered employees. Claimant argues that the Second Circuit in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2nd Cir. 1981), exemplified this tenuous connection by holding that even pier security guards can be considered maritime employees under the Act. Yet, the court explained that:

> The loading and unloading process presents innumerable opportunities for theft. The major function of these petitioners was to protect against the loss of cargo which in our view unquestionably serves a maritime purpose - the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation and is indeed required by the International Longshoremen's Association during the loading and the unloading process. *Id.* at 675.

In other words, the court stated that there is nothing tenuous about the connection between the claimants' security positions on the dock and their holding. These employees work checking and securing cargo while both on and off the vessels. Although not physically loading or unloading the cargo, such activities could not be performed efficiently without the services of the security employees. Thus, the Second Circuit embraces the idea that an employee serves a maritime purpose when he or she aids in the loading or unloading process.

In this matter, Morganti's job duties did not require him to load or unload any vessels. There has been testimony that he occasionally, and voluntarily, assisted Mr. Agard in the transportation of the transducers from the shore to the Paganelli, however, I do not find that this activity can be considered "loading" or "unloading" a vessel. In fact, as Employer noted, the Supreme Court in *Herb's Welding* specifically rejected the

notion that an employee's unloading of gear from a shuttle boat upon arrival at a work platform could be considered maritime employment. *See Herb's Welding*, 470 U.S. at 425. At the same time, I also note that Rocco Morganti was not involved in the building of a vessel. Rather, his job duty consisted solely of testing transducers. As Mr. Lehman noted in his testimony, transducers are not a component of a vessel, but are a part of a combat weapons system, and serve no function in the navigation of a vessel.

The second method by which the parties argue maritime employment is through the bridge provided by the Supreme Court in *Director, OWCP v. Perini North Associates*, 459 U.S. 296 (1983). The Supreme Court held that "if a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the 'status' requirement in Section 2(3)," irrespective of his job duties. *Id.* at 324. The Second Circuit has reiterated *Perini*:

> Because Congress intended the 1972 amendments to expand the scope of coverage, an employee can still establish coverage by demonstrating that he or she satisfies the situs test as it existed before it was expanded by the 1972 amendments, without having to make any further showing regarding status as an employee under §902(3). *Fleischmann v. Director, OWCP*, 137 F.3d 131, 135 (1998)

Therefore, an employee need not be an integral part of the loading or unloading process in order to satisfy the *Perini* doctrine. Instead, the doctrine provides a bridge to an assumed status by way of proving situs and injury.

However, the Supreme Court expressly reserved the question of whether the Act applies to a worker such as Morganti who was only transiently on navigable waters while en route to/from a fixed platform. "We express no opinion on whether coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters." *Perini*, 459 U.S. at 324 n.34. Two years later, the Court in *Herb's Welding* stated, "[w]e also note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Herb's Welding*, 470 U.S. at 427 n.13. *Herb's Welding* involved a "welder who spent roughly three-quarters of his working time on platforms in state waters and the rest on platforms on the Outer Continental Shelf." 470 U.S. at 416. He was injured while working on a fixed platform. Subsequently, the Court noted that a fixed platform is like an island, and therefore the claimant was not injured on navigable waters and was not covered by the Act. *See Herb's Welding*, 470 U.S. at 416 n.2.

I find that the Paganelli is a fixed platform and, as the Court in *Herb's Welding* described, like an island. Testimony in this matter has revealed that the barge has not been moved for twenty years as it is connected by chains to mooring buoys which are

connected to two 60,000 pound anchors and two 8,200 pound sinkers. Further, the barge has no means of self-propulsion and it is physically connected to the land by electrical and cable lines. It is currently not being used as a vessel but instead as a fixed work platform. *See Green v. C.J. Langenfelder and Sons, Inc.*, 30 BRBS 77 (1996) (a dredge with virtually no engine or navigational capabilities except for pull lines and moored to the same position during each six month cycle held not to be a vessel); *Bernard v. Binnings Construction Co., Inc.*, 741 F.2d 824, 831 (5th Cir. 1984) (holding that a work platform is not a vessel if (1) the structure was constructed and used primarily as work platform, (2) the structure is moored or otherwise secured at the time of the accident, and (3) although "capable" of movement and sometimes moved, transportation function was merely incidental to the primary purpose of serving as a work platform). In light of the relevant precedent in this matter, I must hold that the Paganelli is a fixed work platform.

Therefore, the question then becomes whether Morganti's status aboard the Little Toot II was merely transient in nature as he shuttled to/from Portland Point and the fixed platform. I find that Morganti's presence on the waters of Cayuga Lake was transient in nature. In both *Perini* and *Herb's Welding*, the Supreme Court reserved judgment on whether an employee who was injured while on navigable waters would be deemed a maritime employee if he was aboard the vessel only transiently or fortuitously. However, as Employer/Carrier notes in his closing brief, both the Fifth and Eleventh Circuits have held that the Act does not apply to "workmen who are aboard vessels transiently or fortuitously when they sustain injury." *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 909 (5th Cir 1999.) In *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), the Eleventh Circuit affirmed the District Court's dismissal of a claim brought by a land-based electrician who was injured while riding in a boat in which he had helped load supplies and equipment for a job on an island. The court held that even though the injury took place on a vessel on navigable waters, the claimant still needs to satisfy the 'status' as well as the 'situs' component." 903. F.2d at 1527. The court held that the claimant, "was not in any sense engaged in loading or unloading, repairing or building a vessel and his de minimis connection to maritime activity is simply insufficient to fulfill the 'status' requirement of the LHWCA". 903 F.2d at 1528. The Fifth Circuit held in *Bienvenu* that:

> While it is not free from doubt, we believe that the signals from the Supreme Court in *Perini* and again in *Herb's Welding* indicate that the Supreme Court would hold that a workman who was aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA. We join the Eleventh Circuit in reaching this conclusion ...
>
> We therefore hold that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the

status test only if his presence on the water at the time of injury was neither transient or fortuitous. 164 F.3d at 908.

In this matter, the evidence presents that Morganti was aboard the Little Toot II transiently when he sustained his fatal accident. The evidence shows that Morganti spent only one or two days a week on the Paganelli and while there, he would spend approximately seven hours using a computer to test the transducers and process their results. The balance of his time was spent at the Lockheed-Syracuse facility. Lehman TX 251-253. While at the Paganelli, Morganti, like Lehman, would not set up the transducers within the testing well. Instead, Agard would be responsible for such activity. Lehman TX 233. Also, Lehman stated that both he and Morganti would first tell the computer the type of test they wished to run, and then input other information as prompted. Lehman TX 245. Other than work with the computer, Morganti and Lehman were not responsible for any other activity aboard the Paganelli. Further, the trip back and forth from the Paganelli to the dock lasted only five minutes each way. Thus, Morganti would have been on the water only 10-20 minutes per week, or less than 1% of his time at work. In *Bienvenu*, the Fifth Circuit held that the claimant, who spent 8.3% of his time actually at work and on the vessel was sufficient to trigger coverage under the Act. *See Bienvenu*, 164 F.3d at 908. However, Morganti spent less than 1% of his time in transit between a fixed platform and the shore. I cannot liken this situation to that in *Bienvenu*. With this in mind, I find that Morganti does not meet the status requirement of the Act, and is therefore not entitled to benefits.

The third and final argument of the parties regarding Morganti's status in this matter surrounds the exception to the term "employee" found at 33 U.S.C. §902(3)(A). For purposes of coverage under the Act, "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations except individuals employed exclusively to perform office clerical, secretarial, security or data processing work. Although the parties pay little service to this argument in their briefs, I find this point to be the most compelling in holding that the Claimant does not meet the Act's status requirement.

The Supreme Court has addressed the exclusion of clerical workers from coverage, indicating that while, " ... employees who perform purely clerical tasks and are not engaged in the handling of "cargo" are excluded from the Act's coverage, those who "check" items of cargo as they are loaded or unloaded are not similarly excluded." *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 267, 271. Thus, *Caputo* suggests that those persons employed as "checker" involved in loading and unloading functions are covered by the Act, while those persons employed in exclusively office clerical functions are not covered. *See Caldwell v. Universal Maritime Service Corporation*, 22 BRBS 398, 401 (1989). Three pertinent cases expand on this point. First, in *Maher Terminals, Inc. v. Farrell*, claimant worked as a "temporary delivery clerk" processing paperwork for truckers necessary for removal of cargo. 548

F.2d 476 (3rd Cir. 1977). The Third Circuit held that the claimant "came within the congressional proscription of a purely clerical employee whose job did not require him to participate in the loading or unloading of cargo. What is important is the nature of his primary duties. As we perceive the congressional intent, that is the sole test." *Id.* at 478.[6]

Secondly, in *Powell v. International Transportation Services*, 18 BRBS 82 (1986), the Benefits Review Board (Board) upheld an Administrative Law Judge's (ALJ) opinion finding coverage whether the employee who worked in an office or in a yard where cargo was loaded and unloaded. The Board stated, "[i]t is the practical substance of an employee's duties at work which is determinative of coverage. Whether claimant's particular duties are covered under the Act depends upon their relationship to the indisputably maritime activities of loading and unloading ships." *Id.* at 83-84. Thus, any position which may be considered maritime employment, must be clearly related to loading and unloading cargo. The third and final example is found in the facts from *Caldwell, supra*. There, the ALJ found that claimant's duties were related to the loading and unloading of cargo. Particularly persuasive factors included: claimant's hours were tied to the movement of cargo; claimant must remain on duty until the last truck has departed; claimant may be re-assigned as a checker at any time. *See id*. at 402. In affirming the ALJ's decision, the Board quoted the legislative history of the 1984 Amendments instituting the exception at issue. "Excluded clerical employees are land-based workers otherwise covered under a State worker's compensation law, and their duties are performed in an office." *See id*, *quoting* Joint Explanatory Statement of the Committee of Conference at 22, Longhsore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, 98th Cong. 2nd Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2772-2773 (1984).

In this matter, Lehman testified to the job he and Morganti performed while Agard's testimony provided further background into Morganti's typical workday testing transducers at the Paganelli. Lehman TX 249. Agard stated that he usually does the loading and unloading by himself with the use of the two ton crane. Agard TX 210. He stated that this was the practice on December 20, 2000. Agard TX 211. Once the transducers were loaded onto the Paganelli, he stated that he would move them one by one and by hand onto the well area. Agard TX 212. Agard stated that all of the movement of the transducers from Portland Point is done by him alone; both Morganti

---

[6]I note that the later Supreme Court holding in *Caputo* somewhat lessened the standard set by the Third Circuit to state that a claimant is covered under the Act if he spends "at least some of his time" in indisputably maritime activity". *See Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) *quoting Northeast Marine Terminal Co., Inc., v. Caputo*, 432 U.S. 249 (1977). Nevertheless, I find that Morganti spent no time performing indisputably maritime activity, as it is defined by the Act and its relevant caselaw. *See infra.* As such, he is not entitled to benefits using either standard.

and Lehman were not involved in this process. Agard TX 213. At the same time, he stated that he was never involved in the computer work that they did while testing. Agard TX 214.

On a typical day, Agard stated that he would get to the dock around 8:00 a.m. The delivery truck would arrive around 9:30 a.m. and Morganti would arrive around 10:00 a.m. He stated that he would have a transducer in the water by the time Morganti arrived. He stated that all of the movement of the transducers to the testing site and the setting up of the transducers for the computer testing was his responsibility. Agard TX 215. He stated that it generally takes seven hours to finish testing all of the transducers for the day. During those seven hours, he stated that he is moving equipment around and getting them ready for testing. Agard TX 216.

As he depicted, Agard stated that it takes about an hour to test one transducer. Agard TX 217. During that hour, he stated that he walks around the barge while Lehman works on the computer at the test station inputting data. Agard TX 217. He stated that Morganti occasionally helped him and would drive the Little Toot out to the platform. Agard TX 219.

Lehman described the actual testing that he and Morganti performed as involving two types of tests. The first type is a transmit test for sound pressure level in the water for a particular drive level into the transducer. Lehman TX 242. The second test receives sensitivity based on voltage being sent out of the transducer. Lehman TX 242. He stated that during all of these tests, he is sitting at a computer terminal. Lehman TX 243. Regarding interaction with the computer, Lehman stated that he first tells the computer the type of test he wishes to perform, and then it responds with a question such as serial number, test type, or horizontal distance. Lehman TX 245. He stated that the test data is loaded by the computer. Lehman TX 245. Therefore, he essentially does no other work than operate the computer at the computer terminal while running the approximately one hour long test on each transducer. Lehman TX 246-247. At the end of each test, the computer prints out a hard copy of the test results. Lehman TX 248. Later and typically in the Syracuse office, the results are reviewed. Lehman TX 249.

According to Lehman, Morganti and he spent about 30% of their time on the platform gathering data at the computer work station with the remaining time being spent in the Syracuse office processing the collected data. Lehman TX 251. As a result of the work in the lake, Lehman stated that he then makes his determinations regarding whether a unit has passed specifications back at the Syracuse office. Lehman TX 252.

It is clear that the primary nature of Morganti's duties, as described by the aforementioned evidence, were to operate a testing program via computer while on the

Paganelli. Just as the claimant in *Farrell*, he occasionally would board a vessel in order to reach a fixed structure, the Paganelli, in order to perform his duties. Morganti had a negligible and nondescript relationship to the indisputably maritime activities of loading and unloading ships. Although he may have aided Agard at times, it is clear that he did this voluntarily and it was not part of his job description. Instead, Morganti's job description, as well as his job performance, presented little evidence of activity even remotely related to the loading and unloading of a vessel, as required by the Act. As I have made clear, Congressional and relevant caselaw intent indicate that the exception provided in Section 902(3)(A) is applicable to the situation presented by this case. Morganti was an office worker who spent roughly 30% of his time on the Paganelli, with the remainder in the Lockheed-Syracuse office. He spent less than 1% of his time on the Little Toot II commuting back and forth from the Paganelli. Thus, the majority of Claimant's work was performed in an office in Syracuse, New York. The remainder of his work involved merely incidental trips to the Paganelli, a fixed structure[7], in order to perform his data collection and processing. In light of this and all the above facts, I hold that Morganti was performing purely data processing work while on the Paganelli and is excluded from coverage by virtue of Section 902(3)(A) of the Act.

As Claimant fails to meet the enumerated status requirements of the Act, in addition to being an employee who performed data processing work, he is not a covered employee by way of 33 U.S.C. 902(3) and is not entitled to benefits under the Act. Accordingly, Claimant's claim for compensation is denied.

ORDER

The claim of **LORRAINE MORGANTI** for benefits under the Lonqshore and Harbor Workers' Compensation Act, is hereby **DENIED.**

A

PAUL H. TEITLER
ADMINISTRATIVE LAW JUDGE

Cherry Hill, New Jersey

[7] *See supra*, my holding that the Paganelli is a fixed structure at p. 29.